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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WILLIE E. BRACEY, JR. Appellant.	)	2 CA-CR 2010-0171 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR 200900103

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; MODIFIED IN PART;
VACATED IN PART AND REMANDED

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K E L L Y, Judge.

¶1 Following a three-day trial, appellant Willie Bracey was convicted of aggravated assault, disorderly conduct, endangerment, interfering with a judicial proceeding, and criminal damage. The trial court sentenced Bracey to concurrent

sentences, the longest of which is five years, with credit for 443 days served. Counsel has filed a brief in compliance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating he has searched the record and has found no arguable issues to raise on appeal. Counsel has asked us to search the record for "reversible error." In searching the record for fundamental error, we found a potential error regarding the classification of the criminal damage conviction, and thus directed the parties to file briefs on this issue, which they have done.

¶2 Viewed in the light most favorable to sustaining the verdicts, the evidence was sufficient to support each of the jury's findings of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). On February 17, 2009, while attempting to serve an eviction notice on Bracey, who was in his apartment, a constable heard a sound "like the slide action of a pump shotgun" from inside, followed by a "blast" through the roof.

¶3 In reviewing the record for reversible error pursuant to *Anders*, we observed that count five of the indictment charged Bracey with criminal damage "in an amount of more than two hundred fifty dollars but less than two thousand dollars," which was correctly designated as a class six felony pursuant to the former version of A.R.S. § 13-1602(B)(3) which applies to Bracey. *See* 1996 Ariz. Sess. Laws, ch. 361, § 2. After both sides rested, the trial court granted, in part, Bracey's motion for a judgment of acquittal on count five pursuant to Rule 20, Ariz. R. Crim. P. The court agreed there was insufficient evidence from which the jury could find the value of the damage to the roof to be greater than $250, and thus ruled "[t]here won't be an element submitted to the jury

to determine the value of the damage because there would be insufficient basis to allow them to determine that." The prosecutor then informed the court, "I think that may have been a class 1 misdemeanor at the time of this incident . . . [b]ecause it would be the next down from a class 6 felony." The court agreed, and Bracey was convicted of and sentenced for a class one misdemeanor for criminal damage. However, under the applicable version of the criminal damage statute, *see* former A.R.S. § 13-1602(B), any damage in an amount of $250 or less, the applicable amount here, was a class two misdemeanor. *See* former A.R.S. § 13-1602(B)(3), (B)(4).

¶4 As both sides correctly pointed out in the briefs filed at our direction, Bracey was incorrectly convicted of criminal damage as a class one misdemeanor. We find, and the state concedes, that the error here was fundamental. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("Imposition of an illegal sentence constitutes fundamental error."). The state contends, however, the error was not prejudicial "because [Bracey] has already served his sentence, and the incorrect designation did not affect the overall amount of time he is required to serve for the convictions." We disagree. Whether fundamental error is prejudicial "involves a fact-intensive inquiry . . . ." *State v. Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d 601, 608. Here, Bracey was erroneously convicted and sentenced to the six-month term of imprisonment for a class one misdemeanor, rather than the four-month maximum term permitted for a class two misdemeanor. *See* A.R.S. § 13-707(A). We thus conclude Bracey has been prejudiced by the fundamental error.

¶5 We therefore vacate Bracey's sentence on count five, reduce the class of misdemeanor to a class two, and remand this matter to the trial court for resentencing on count five. In all other respects, having found no other error that is both fundamental and prejudicial, we affirm.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge